

## DECISION #07-02

### DECISION ON THE PETITION FOR REVIEW BY AUTOPLEX REALTY, LLC

Public hearings of the Acton Board of Appeals were held in the Town Hall on May 7, 2007 and May 14, 2007 on the **PETITION FOR REVIEW** by Autoplex Realty, LLC, seeking to overturn the Building Commissioner's zoning determination that the use of the property for parking and storage of motor vehicles contained in the Petitioner's application to the Board of Selectman for a Class I license would be a violation of Acton Zoning Bylaw Sec. 6.7.2 at 50 Powdermill Road. Map J-3/Parcel 49.

Sitting for the Board of Appeals were Jonathan Wagner, Chairman, Ken Kozik, Member and Cara Voutselas, Member. Also present at the 5/7 hearing were Garry Rhodes, Building Commissioner; Cheryl Frazier, Board of Appeals Secretary; Leo Bertolami, Manager of the Petitioner, Attorney Richard A. Nylen, Jr., representing the Petitioner; and several other witnesses. Mike Coates of Acton Hydro Co., Inc., an abutter, was also present at the 5/14 hearing.

Chairman Wagner opened the hearing and read the contents of the file. The file contained (a) Petition For Review dated 2/27/07 together with a cover letter from the Petitioner's attorney, (b) Interdepartmental Communication dated 1/29/07 from Building Commissioner Garry Rhodes addressed to the Board of Selectmen explaining his position that the use of the property for parking and storage of motor vehicles as shown on the Petitioner's application to the Board of Selectman for a Class I license would constitute a violation of Acton Zoning Bylaw Sec. 6.7.2, (c) Interdepartmental Communication dated 5/7/07 from Roland Bartl, Town Planner stating he agreed with the Building Commissioner's decision, (d) Memorandum dated 5/7/07 from the Petitioner's attorney summarizing Petitioner's position that the Building Commissioner's decision should be overturned (with accompanying affidavits that stated the property has been used at various times over the last 50 years for parking and storage of motor vehicles.) Also submitted at the 5/14 hearing was a letter from Rose Prescott (undated) stating that as a tenant at the adjacent property for over 30 years she had observed motor vehicles parked on the property and several photographs submitted by Mr. Bertolami which purported to show motor vehicles parked on the property over the last 50 years.

In response to Chairman Wagner's request to explain the reasons for his decision, Garry Rhodes stated that he had received a request from the Board of Selectmen for comments concerning a Class I license application to the Board of Selectmen. Included in the application was a plan to store motor vehicles adjacent to the former building located at 48 Powdermill Road and that the area where the vehicles were to be stored was within the front 30' foot setback required by the

Zoning Bylaw. Consequently, the applicant would have to obtain a variance to use the property to store and display motor vehicles for sale within the 30' front set back area. In response to the Petitioner's position that the property had been used for this purpose for many years preceding the effective date of the present Zoning Bylaw and was therefor a nonconforming use, the Building Commissioner's position was that in fact the property had not been so utilized, and, if it had been so utilized in the past, it had not been so utilized within the last 2 years and therefor had been abandoned. In reaching his determination, he had reviewed the town files and did not find any licenses or other documentation to support the Petitioner's claim that the property had been continuously used for display and storage of motor vehicles in connection with the sale of motor vehicles and that he had never observed the property being used in this manner in the years since he has been the Building Commissioner. He also noted the storage of motor vehicles on the property as intended by the Petitioner is a *principal* use; and if the area intended for parking under his license application had in fact been used to park motor vehicles, such use at best was an *accessory* use for parking associated with the demolished buildings on the site and the adjacent parcels and not for the parking, display and storage of motor vehicles for sale.

Mr. Bertolami responded that he was a long-term resident of Acton and that in his experience the property had always been used for storage and "staging" of vehicles in connection with motor vehicle sales. George Robinson, former Police Chief of Acton, testified that during his tenure on the police force in Acton the property had been used for storage and "staging" of motor vehicles sporadically but consistently over many years. George Palli, owner of Acton Subaru, testified that he had in fact used the property at various times over many years to display and park motor vehicles for sale.

Garry Rhodes responded that in all the years he was employed as Building Commissioner he had never observed motor vehicles parked on the property for display or storage in connection with motor vehicle sales (except when done "illegally" in connection with the Petitioner's recent expansion of his sales dealerships on adjacent parcels and which had been the subject of correspondence to Mr. Bertolami notifying him of the "illegal" use). Board Member Ken Kozik stated that he had worked in the area for many years, passed by the property to and from work every day and had never observed vehicles parked at the site in connection with motor vehicle sales. Board Members Jonathan Wagner and Cara Voutselas, also stated that as residents of Acton over the last 10-15 years they had never observed motor vehicles being parked on the property in connection with motor vehicle sales or for any purpose other than as customers or tenants of the buildings at 46-50 Powdermill Road.

At the 5/14 hearing the Board inspected the photographs submitted by Mr. Bertolami and noted that there appeared to be no photographs indicating that motor vehicles were parked on the property for the purpose of display or storage in connection with motor vehicles sales, a view which was reiterated by Garry Rhodes when asked whether he had any comments on the photographs. The photographs showed only that one or a few automobiles were parked on the property. (One photograph showed a vehicle parked on land across the street from the property in question.)

The Board of Appeals, after considering the materials submitted with the Petition, together with the information developed at the hearing, finds that:

1. The Petitioner has submitted an application to the Board of Selectman for a Class I license to display and store motor vehicles at 50 Powdermill Road in connection with the sale of motor vehicles from an adjacent parcel.

2. In reviewing Petitioner's license application on behalf of the Board of Selectmen, the Building Commissioner determined that:

- (a) the proposed use of the property was within the 30' front setback area and therefor in violation of Acton Zoning Bylaw, Sec. 6.7.2;
- (b) the property had not been used for the proposed use previously and therefor did not constitute a nonconforming use;
- (c) if the property had been used for the proposed use and was a nonconforming use, such use had been abandoned.

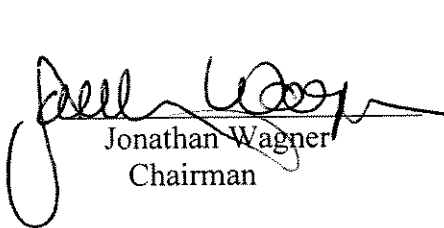
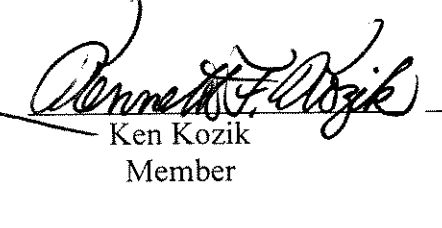
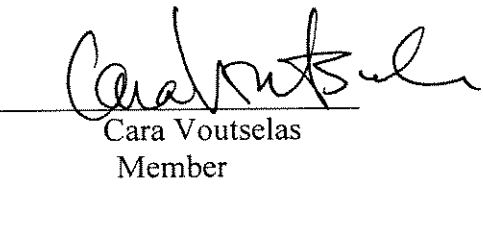
3. While there was testimony from the Petitioner and witnesses that the property had been used for the proposed use at various times during the past 40 years:

- (a) the observation and personal experience of the Building Commissioner and all Board Members was that the property had not been utilized for the proposed use during the last 20 years;
- (b) the Board was not persuaded that the property had been used for the proposed use prior to 20 years ago other than as an occasional use without legal authority.


Based on the above findings, the Board of Appeals voted to **UPHOLD** the decision of the Building Commissioner that the proposed use of the property for parking and storage of motor vehicles is a violation of Acton Zoning Bylaw Sec. 6.7.2 and is not allowed.

Any person aggrieved by the decision may appeal pursuant to Massachusetts General Laws, Chapter 40A, Section 17 within 20 days after this decision is filed with the Acton Town Clerk.

**TOWN OF ACTON BOARD OF APPEALS**

		
Jonathan Wagner Chairman	Ken Kozik Member	Cara Voutselas Member

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on June 15, 2007.

  
Cheryl Frazier, Secretary  
Board of Appeals